



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2010

Ms. Julia Gannaway
Lynn Pham & Ross, LLP
306 West Broadway Avenue
Fort Worth, Texas 76104

OR2010-14361

Dear Ms. Gannaway:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 394303.

The City of La Marque (the "city"), which you represent, received a request for all of the requestor's e-mails from March 1, 2010, through June 14, 2010. You state you will release some information to the requestor. You also state you will redact social security numbers pursuant to section 552.147 of the Government Code.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.130, 552.136, and 552.137 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. We have considered your arguments and reviewed the submitted representative sample of information.²

¹ Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information includes a CR-3 accident report form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses section 550.065(b) of the Transportation Code, which states that except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *See* Transp. Code § 550.065. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). In this instance, the requestor has not provided the city with the requisite pieces of information specified by the statute. Accordingly, the city must withhold the submitted CR-3 accident report, which we have marked, under section 552.101 in conjunction with section 550.065(b) of the Transportation Code.³

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

This office has also found personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

governmental body and the basic facts about that transaction are not private under section 552.101. ORD 600 at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).

Upon review, we agree most of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right of privacy.⁴ We agree some of the remaining information at issue also contains information about city employees which may be considered highly intimate or embarrassing. However, because this information pertains to workers' compensation claims and non-voluntary employee contributions, we find there is a legitimate public interest in it. *See* Open Records Decision Nos. 545 at 4 (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 423 at 2 (1984) (scope of public employee privacy is narrow). Furthermore, some of the remaining information relates to individuals who are not identified. Consequently, we find the remaining information at issue is either not highly intimate or embarrassing, or is of legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the attachments to Exhibit B consist of communications between city staff and city attorneys that were made for the purpose of providing legal advice to the city. You have identified the parties involved in the communications. You assert these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the attachments to Exhibit B. Accordingly, the city may withhold this information under section 552.107 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Accordingly, if the employees at issue timely elected to withhold their personal information pursuant to section 552.024, then the city must withhold the information you have marked, as well as the information we have marked, under section 552.117 of the Government Code.⁵ The city may not withhold this information if the employees did not make timely elections to keep the information confidential.

Section 552.130 of the Government Code excepts from disclosure “information [that] relates to...a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” *Gov’t Code* § 552.130(a)(1). Accordingly, the city must withhold the Texas driver’s license number you have marked in Exhibit G pursuant to section 552.130 of the Government Code.

⁵Regardless of the applicability of section 552.117, as previously noted, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

Next, you assert the information you have marked in Exhibit C is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). Upon review, we find you have failed to explain how the information at issue constitutes a credit card, debit card, charge card, or access device number. Accordingly, the city may not withhold any of the information at issue under section 552.136 of the Government Code.

Section 552.137 of the Government Code states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The e-mail addresses you have marked, and the additional e-mail address we have marked, are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code.

In summary, the city must withhold the CR-3 accident report we have marked under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code. The city must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the attachments to Exhibit B under section 552.107 of the Government Code. The city must withhold the information you have marked and the information we have marked under section 552.117(a)(1) of the Government Code to the extent it pertains to current or former city employees who timely elected confidentiality. The city must withhold the Texas driver’s license information you have marked in Exhibit G under section 552.130 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code.⁶ The remaining information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver’s license number under section 552.130 of the Government Code, and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/tp

Ref: ID# 394303

Enc. Submitted documents

c: Requestor
(w/o enclosures)
